IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, VIRGINIA.

FRANK C. ROHR, Plaintiff, *v.* THE CITY OF RICHMOND AND SAMUEL P. WADDILL et als., Trustees of the First Baptist Church of Richmond, Virginia, Defendants.

June, 1914.

1. **Damages—Excessive Damages—Province of Court and Jury.**—The amount of damages in an action for personal injuries is a question for the jury and unless it is shown that the jury were actuated by prejudice or partiality their verdict will not be disturbed.

2. **Religious Societies—Liability for Tort.**—A religious society is not immune from liability for tort.

3. **Religious Societies—Powers and Duties of Trustees.**—Trustees of religious societies appointed under § 1399 of the Code merely hold the legal title of the real estate conveyed for the use of a religious society at whose instance they have been appointed and have no power over the management, control and acquisition thereof of their own volition.

4. **Religious Societies—Actions for Personal Injuries—Parties.**—In an action against a church for injury caused by a defective cellar-cap in the sidewalk upon which the church building abuts, the trustees not being charged with the duty of maintaining the same and the title to the church property not being involved nor recovery of damages for injury to church property, the trustees are not proper parties defendant.

5. **Religious Societies—Action for Personal Injuries—Parties.**—Religious societies, like other unincorporated bodies, must be sued by making members of the association parties defendant.

6. **New Trial—Matters Not Appearing in Record.**—Where there is no evidence nor anything in the record to show that persons named as trustees of religious societies and made defendants were appointed and qualified as trustees, a verdict against them will be set aside, but where evidence shows the appointment and qualification of some of those named, judgment may be entered against them ignoring those not qualified or permitting a non-suit to be taken as to them.

7. **Religious Societies—Action for Personal Injuries—Degree of Care—Instructions.**—An instruction that a property owner must use more than ordinary care in constructing and keeping in repair the sidewalk upon which its property abuts, is erroneous, the owner being charged only with negligence in failing to keep the property in repair or properly protected when out of repair.

8. **Negligence.**—The term negligence and ordinary care are correlative terms, negligence being the want of ordinary care.

9. Presumptions and Burden of Proof—Res Ipsa Loquitur.—The doctrine of res ipsa loquitur is not applicable where there is direct evidence as to the cause of the accident, and an instruction in an action for personal injuries caused by a defective cellar-cap in the sidewalk that the jury might consider the happening of the accident as evidence of the lack of care in the maintenance of the covering to the cellar-cap, is erroneous.

10. Municipal Corporations—Notice.—Notice to an employee of a religious society of the defective condition of the sidewalk on which the property of the society abutted can not be held to be notice to the city, corporations acting only through their officers and agents duly constituted and appointed to perform certain functions respectively delegated to them concerning the business of the corporation.

11. Municipal Corporations—Notice—Defects in Streets.—Where defects in the streets of a municipal corporation are caused by others, the municipal corporation is held liable only by showing it had either actual or constructive notice of the defects in time to have them removed. Actual notice must be to some of its officers or servants having supervision of its streets or with authority to direct work thereon. Constructive notice is where the defect complained of has existed for such a length of time that by the exercise of ordinary care it could have been discovered.

Upon motion for new trial. The opinion states the case.

OPINION OF THE COURT.

J. M. MULLEN, JUDGE: This is an action of tort for the alleged negligence of the defendants to keep and maintain in proper repair a cellar-cap on Twelfth Street constructed by the First Baptist Church of Richmond, Va., under authority duly given, whereby it is alleged the plaintiff was injured by reason of a defect in said cellar-cap.

At the trial, had in December last, the jury returned the following verdict: "We, the jury, on the issues joined, find for the plaintiff and assess his damages at $3,000, and find the Trustees of the First Baptist primarily liable."

The defendants moved the Court to set aside said verdict and grant them a new trial upon the ground that it was contrary to the law and the evidence of the case and for giving and refusing to give certain instructions.

It is urged that the amount of damages given by the jury, to-wit, $3,000, is excessive. If the injuries received by plaintiff were to the extent to which he and Dr. Peyser testify, the Court can not say the damages so assessed are excessive. There is no suggestion in the record that the jury were actuated by prejudice or partiality; and, therefore, says the Court in

Norfolk Ry. & Light Co. *v.* Spratley, 103 Va. 379, "upon well settled principles their verdict can not be disturbed." See also W-V. Ry. Co. *v.* Bouknight, 113 Va. 696.

It is further insisted by counsel for the First Baptist Church that a church can not be sued in tort. While it has been so held in many jurisdictions, it would seem from recent decisions that the doctrine of total immunity from liability of religious societies for tort has, upon reason and authority, been rejected. Hordern *v.* Salvation Army, 139 Am. St. Rep. 889 (892), and note thereto especially on page 905. See also Bruce *v.* Central M. E. Church, 11 Am. & Eng. Ann. Cases 150.

But a more serious question in this connection is, if such bodies are not immune from liability, how shall they be sued? Here, the action is brought against certain persons represented as trustees of the First Baptist Church, and it is claimed that § 1402 of the Code is authority for so doing. It is there stated that trustees of a church duly appointed and qualified under the § 1399 "may in their own names sue for and recover any real or personal estate held by them respectively in trust, or damages for injury thereto, *and be sued in relation to the same.*" Now § 1399 simply provides for the appointment of trustees to hold the legal title to lands belonging to a church. It will be seen from the provisions of these statutes that trustees are appointed simply to effect the purposes of the conveyance, so that the legal title shall vest in them. They have no control or management of the property or affairs of the church and no power of their own volition to alien or encumber or repair the real estate. Referring to § 1402, the Court in Globe Furniture Co. *v.* Trustees of Jerusalem Baptist Church, 103 Va. 561, says:

"It is very plain that this section * * * relates only to suits by or against the trustees touching the property, the legal title to which is vested in them; and that they merely hold the legal title to the real estate conveyed * * * for the use of the religious congregation at whose instance they have been appointed, and have no power of their own volition, and in their capacity as trustees, to either alien or encumber such real estate."

As was said in the above case "church trustees are creatures of statute, and their powers are limited by the law that authorizes their appointment."

It is significant that, while, in the above case, the legal title to the property purchased for the church was such as vested in the trustees under the statute (§ 1409), it was held the trustees had no authority to purchase the same; and, therefore, they could not be sued as trustees for the purchase price, show-

ing conclusively that their only connection with church property is to hold the legal title thereto, leaving its management, control and acquisition exclusively to the church authorities.

It is contended, however, by the plaintiff, that this action relates to the church property, but the Court is clearly of the opinion that this contention is not tenable. The injury complained of resulted from an alleged defect in the cellar-cap in the side-walk upon which the church building abuts. But were it conceded this cellar-cap was church property, the trustees were not charged with the duty of maintaining the same, and, as the title to church property is not involved in this controversy, nor to recover damages for injuries thereto, the trustees are not proper parties.

If, therefore, the First Baptist Church can not be sued for the alleged tort in the name of the Trustees who simply hold the legal title to the church property, and are charged with no duty to make repairs or additions thereto; and, conceding for argument the church is liable in damages for injuries resulting from failure to keep its premises in a safe condition, how is it to be sued? The answer is, like any other unincorporated body, by making the members of the association parties defendant. It may be insisted this would be impossible on account of its numerous members composed not merely of adults, but also of children. The Court must confess it is unable to get around this contention, unless it be that the liability is limited to those employees, servants, or officers who committed the alleged wrong, or who are charged with the special duty of looking after the property and the management of the affairs of the association. This difficulty of making such bodies parties to actions-at-law, is pointed out by the Court in Coffman *v.* Sangston; 21 Gratt. 263. This was a suit in equity brought by a voluntary society in the name of its secretary against one Coffman, for an account and for payment of money Coffman had collected for the society on claims of the society placed in his hands for collection. One of the grounds of error alleged by the defendant was that the plaintiff had a plain and adequate remedy at law, by action of assumpsit. Staples, Judge, who delivered the opinion of the Court, says:

"In the present case, it is alleged that the members of the society are too numerous to sue in their own names, numbering from four to five hundred. In an action at law all these members must have joined as plaintiffs."

But, aside from all this, and assuming for the sake of argument, that the First Baptist Church has been properly made a party to this action by naming its supposed trustees as defendants, there is no evidence, so far as the Court has been

able to find, that any of the persons so named as defendants were ever appointed or qualified as trustees. It is intimated somewhere in the argument of counsel that two were so appointed and qualified; but that must be merely an intimation, for there is nothing in the record to show the appointment or qualification of either of these gentlemen as trustees, the only thing being the allegations of the declaration to that effect. If, therefore, proof is lacking to establish this fact, it is very clear the verdict should be set aside for that reason, if for no other. If, however, there was evidence of the appointment and qualification of two of those named, this objection would not avail. Judgment could be entered against them, ignoring those not qualified, or permitting a non-suit to be taken as to them. Code, § 1402.

And this brings us to the consideration of the instructions given and refused to which defendant excepts.

It may be that instruction No. 2 is open to the objection of counsel. There was evidence that the plaintiff knew of the defect in the cellar-cap, and this fact should have been adverted to in this instruction and the instruction modified in this respect. Instruction No. 8 may remove this objection, as, ordinarily, instructions must be considered as a whole; yet where conflicting or inconsistent instructions are given calculated to confuse and mislead the jury, this rule would be of little or no practical benefit.

But there are more serious objections to other instructions, notably No. 3, in which the jury are instructed that the property owner must use *more than* ordinary care in constructing and keeping in repair the alleged side-walk. Unless the property owner in a case like this is an insurer against accidents, and the Court is clearly of the opinion, if the First Baptist Church had the authority of the City to construct this cellar-cap, it is not an insurer, then the church could only be charged with *negligence* in failing to keep the cellar-cap properly repaired or properly protected when out of repair.

The terms "negligence" and "ordinary care" are correlative terms—"negligence" is the "want of ordinary care." To charge one with "negligence" is nothing more than the charge that he has failed to exercise ordinary care under the circumstances of the particular case. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would have exercised. To instruct the jury that one charged with negligence must exercise more than "ordinary care" is erroneous. There are degrees of care, but this is regulated by the circumstances of the given case; and it would not be erroneous for

the Court to instruct the jury that, in given cases, the party charged must exercise a high, or even the highest degree of care, as where there is a contractual relation between the person guilty of negligence and the person injured; but, in the last analysis the care required is "ordinary care," the degree of which is regulated by the circumstances of the particular case. As is said in C. & O. R. Co. *v.* Farrow, 106 Va. 137 (140):

"The duty is expressed by the term, "ordinary or reasonable care to prevent injury," but it means reasonable or ordinary care in the light of the surrounding facts and circumstances; so that the care required to prevent the infliction of injury is always proportioned to the probability that exists that an injury will be done under the circumstances which are known to exist, or from past experience may be reasonably expected to exist in a particular case."

Ordinary care is a relative term, and the care required in some instances under the facts and circumstances of that case may be greater than in others, but the legal term or expression is that ordinary care only is required, the degree of vigilance being fixed by the facts and circumstances of the particular case.

In Instruction No. 4, the jury were told they might consider the happening of the accident as evidence of lack of care in the maintenance of the covering to the cellar-cap. This is invoking the doctrine of *res ipsa loquitur*. It is not applicable to the facts of this case, if for no other reason, because there is direct evidence as to the cause of the accident. It is also open to the objection that it puts upon the defendant trustees the burden of proving that the covering was provided and maintained wih ordinary and reasonable care and that this proof must be by preponderance of the evidence in their favor. It is a familiar doctrine that he who alleges negligence must establish it by satisfactory evidence. In W-V. Ry. Co. *v.* Bouknight, 113 Va. 696, the Court held that "a presumption of negligence arises from the proof of a derailment and that the burden of proof is upon the defendant to show that it is without fault." This was a case in which the doctrine of *res ipsa loquitur* was properly invoked; yet, in a subsequent case, N. S. Rwy. Co. *v.* Tomlinson, 81 S. E. R. (Va.) 89, the Court reverses itself in the Bouknight Case, supra. Says Buchanan, Judge, delivering the opinion of the Court in Tomlinson's Case:

"In many cases, as in this, the maxim of *res ipsa loquitur* applies. The affair speaks for itself. But whether the evidence relied on by the plaintiff to make out a cause of action is the accident itself, from which arises a presumption of neg-

ligence, or is direct evidence of negligence, the burden of proof as to the defendant's negligence remains upon the plaintiff throughout the trial."

As to instruction No. 5, the Court was in error in instructing the jury that the city of Richmond was charged with any knowledge that they may believe from the evidence the janitor had, that is to say, that the city of Richmond was charged with any notice of the defective condition of the hole in the covering on the sidewalk that the janitor of the First Baptist Church had, thereby making the janitor of the church the agent of the City. Corporations act only through their officers and agents duly constituted and appointed to perform certain functions respectively delegated them concerning the business of the corporation. "A corporated body never can either take care or neglect to take care except through its officers or servants." Where defects in the streets of municipal corporations are caused by others, the municipal corporations are held liable only by showing it had either actual notice or constructive notice of the defects in time to have had them removed. Actual notice must be to some of its officers or servants having supervision of its streets, or with authority to direct work thereon. Constructive notice is where the defect complained of has existed for such a length of time that, by the exercise of ordinary diligence, it could have been discovered.

In conclusion, it has been shown that the trustees of the First Baptist Church were not charged with the duty the declaration seeks to impose upon them. An action for negligence does not lie unless the defendant was under some duty, not performed, to the party injured at the time and place where the injury was inflicted. There can be no negligence without the existence of a corresponding duty.

For the above reasons, the Court is clearly of the opinion, the verdict of the jury should be set aside and a new trial awarded, and it is so ordered.

Note.

The court, in this case, after ruling that an unincorporated association, though composed of numerous members, must be sued by making all of its members parties, suggests that the difficulty might be surmounted on the theory "that the liability is limited to those employees, servants or officers who committed the alleged wrong or who are charged with the special duty of looking after the property and the management of the affairs of the association."

This view relates more to the personal liability feature and it seems to be the general rule that members of unincorporated associations can be held liable only when they have in some way been instrumental in creating a debt or have ratified it afterwards. The contrary view, however, is taken in Georgia, the courts there holding that members of unincorporated religious societies are liable on its contracts as joint promisors or partners. "The rule of law is that

no association of persons can appear in court as a corporation, unless organized as such in the manner provided by law. Hawes, Parties, § 92; Dicey, Parties, p. 169. It must be borne in mind that none of the members or congregation of the church are sued as such; that it does not appear whether its property is held by trustees or not, but, even if it was, the trustees were not made parties defendant, nor served. In the case of Wilkins *v.* St. Mark's Church, 52 Ga. 351, this court held that a religious society which is not incorporated according to law, or which has not recorded its name and objects, as provided by the Code, cannot be sued as such. Its members are liable on its contracts as joint promisors or partners. And in the case of Barber *v.* Albany Lodge, 73 Ga. 474, a demurrer ore tenus was made to the petition when the case was called for trial, which was sustained, and, exception being taken, this court ruled that some person must be sued, either natural or artificial; that no person was sued in the complaint exhibited; and the demurrer was therefore good." Thurmond *v.* Cedar Springs Baptist Church, 110 Ga. 816, 36 S. E. 221, 222.

In Perkins *v.* Seigfried's Adm'r, 97 Va. 444, 34 S. E. 64, the court lays down the rule that an unincorporated association may sue or be sued in equity by making one or more of its members parties in behalf of the others, citing Coffman *v.* Langston, 21 Gratt. 263, and Berkshire *v.* Evans, 4 Leigh 223. The court further quotes with approval Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708, saying: "We approve the principle announced by the supreme court of Pennsylvania in the case of Phipps *v.* Jones, 59 Am. Dec. 708, where it was said: 'There ought to be no doubt about the right of unincorporated religious societies to sue on a contract made with them in their associate capacity and for the legitimate purposes of their association, even though there be no persons named or described in the contract as trustees or committeemen on behalf of the society. Such associations have always, and especially since the act of 1731, been recognized as having an associate and quasi corporate existence in law, with power to hold land and build appropriate houses, and, of course, with power to acquire rights by contract, and to vindicate them. And, if the English common-law forms are insufficient for such cases, we admit the infusion into our law of the plain equity that allows a committee of voluntary societies to sue and be sued as representatives of the whole. There is therefore no difficulty about sustaining this action, if it has a contract to rest upon.'" Perkins *v.* Seigfried's Adm'r, 97 Va. 444, 34 S. E. 64, 66.

This was not a suit in equity but an action at law (assumpsit). In some states it is now provided by statute that where the members of an unincorporated association are too numerous to be sued collectively one or more may be sued and defend for the whole.

"The church if incorporated, should have been sued by its corporate name. If not, the individual members of the church might have been sued collectively, or under § 1680 of the Code of 1851, if they were too numerous and it was impracticable to bring them all before the court, then one or more could have been sued, who could have defended for the whole, provided Tracy acted as their agent. In either event, whether against the corporation as such, or against the individual members of the church, the Catholic Bishop holding the legal title should also have been made a party." Keller *v.* Tracy, 11 Withrow (Iowa) 530, 531.

It might be well for the legislature to pass a similar law, for where equity cannot take jurisdiction it would seem that under the present status of the law, there would be no remedy for the wrong committed by such unincorporated societies.